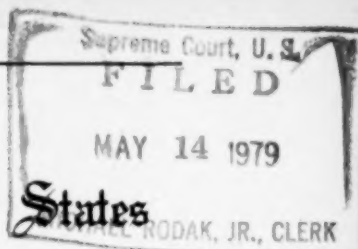


In The

Supreme Court of the United States



October Term, 1978

No.

78-1717
JOSEPH DOTTINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

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TABLE OF CONTENTS

	<i>Page</i>
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	5

TABLE OF CITATIONS

Cases Cited:

Boyd v. United States, 116 U.S. 616 (1886)	4
Doyle v. Ohio, 426 U.S. 610 (1976)	5
Griffin v. California, 380 U.S. 609 (1965)	4
Reid v. Riddle, 550 F.2d 1003 (4th Cir. 1977)	5
United States v. Harp, 536 F.2d (5th Cir. 1976)	5

Statutes Cited:

26 U.S.C. §7201	1, 2
26 U.S.C. §7206(1)	1, 2
28 U.S.C. §1254(1)	2

Contents

Page

United States Constitution Cited:

Fifth Amendment2, 4, 5

APPENDIX

Appendix A — Opinion of the United States Court of Appeals
for the Third Circuit 1a

In The

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No.

JOSEPH DOTTINO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

Petitioner Joseph Dottino prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming his conviction in the United States District Court for the District of New Jersey for willful evasion of and filing false returns of Federal Income Tax [26 U.S.C. §§7201 and 7206(1)].

OPINION BELOW

The opinion of the Court of Appeals, not officially reported, is printed in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the petitioner's Fifth Amendment constitutional rights were denied where petitioner has not taken the stand and the Government in summation has commented on:

(a) Petitioner's failure to produce his individual books and records at trial; and

(b) Petitioner's failure to raise a defense at an early investigatory stage?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution is involved.

STATEMENT OF THE CASE

Petitioner Joseph Dottino (hereinafter "taxpayer"), was indicted on April 10, 1978, for violating Title 26 U.S.C. §§7201 and 7206(1). The indictment charged taxpayer with willfully attempting to evade substantial amounts of income taxes for the years 1972 and 1973 (Counts I and II) and with filing false personal income tax returns for the years 1972 and 1973 (Counts III and IV). Taxpayer was convicted by a jury on all four counts and sentenced to a six month period of incarceration.

Taxpayer's defense was that he had not knowingly and willfully misstated the facts on his personal income tax returns.

The falsity of the returns is not disputed. This defense was based on the argument that books and records needed for the preparation of the tax returns in question were unavailable at critical times.

Taxpayer did not testify as to this defense but the defense was asserted by other witnesses. In summation, the Government made numerous comments directed to the absence of these books and records.

REASONS FOR GRANTING THE WRIT

With respect to the taxpayer's defense, the Government, during its summation made the following comments:

"1. (App. 11a-7)

'Then later you heard Mr. Levitin (the landlord) talk about all of these records. And what did he say? There were big books, piles and piles of books he saw. Did you see any of those books in this courtroom? No, you didn't. Why, ladies and gentlemen? Because they had nothing to do with the money that Mr. Dottino didn't report on his income tax returns. That's why you didn't see them.'

2. (13a-7)

'Did you hear anything about the constable in '74? No, of course not. Because he hadn't heard about finding out the \$188,000.00. That's why you don't hear about the constable.'

3. (15a-11)

'Where are the books and records? Well the constable took them. Then he is given them back

in July. Mr. Saposnick was to put in any expenses. What happened to the books and records? Mr. Hoffman came back from the dead and took the records.'

4. (17a-20)

'We don't know what happened to the books and records. Although one thing you can be pretty sure of, they have nothing to do with the case, those books and records. And if they had and if they were so crucial, where are they? Where are the big books that Mr. Levitin told you about? They are not here. We uncovered some checks and Mr. Saposnick brought those into the IRS but where are these big ledger books?' "

Appropriate motions and objections to the summation and charge were made by the defendant.

As to the issue of willfulness, the Government's comments in summation are clearly improper and constitute a breach of the taxpayer's Fifth Amendment rights which require reversal.

The taxpayer chose not to testify. The evidence of the unavailability of his books and records at the critical time was introduced by other witnesses. Clearly, an individual may not be compelled to incriminate himself by his books and records at a trial. *Boyd v. United States*, 116 U.S. 616 (1886). The Government's comments on the failure to produce taxpayer's books and records at trial constitute the core of the summation and is reversible error! *Griffin v. California*, 380 U.S. 609 (1965).

This inference sought by the Government that the books and records, if produced, would establish guilt violates the taxpayer's constitutional rights against self-incrimination.

The Government compounded matters during summation by referring to the fact that the taxpayer did not state his defense of the unavailability of these books and records in a 1974 statement to an IRS agent. This is referred to in the statement "about the constable in 1974". It was established that these documents were seized by a constable sometime in 1973.

This case is closely analogous to *Doyle v. Ohio*, 426 U.S. 610 (1976). Petitioner submits that these comments during summation violate the taxpayer's right to remain silent, insured by the Miranda warnings and, therefore, violate taxpayer's due process rights under the Fifth Amendment. Taxpayer's silence is, in effect, being used against him. This is improper. *United States v. Harp*, 536 F. 2d 601 (5th Cir. 1976); *Reid v. Riddle*, 550 F. 2d 1003 (4th Cir. 1977).

CONCLUSION

For the foregoing reasons, the writ of certiorari prayed for should be granted.

Respectfully submitted,

s/ John W. Noonan
Attorney for Petitioner

1a

**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 78-2323

UNITED STATES OF AMERICA

vs.

DOTTINO, JOSEPH

Appellant

(D.C. Crim. No. 78-00097)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

Submitted Under Third Circuit Rule 12(6)

March 20, 1979

Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges*
and MARKEY, Chief Judge*

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Newark, New Jersey 07102
Attorney for Appellant

ROBERT J. DEL TUFO
United States Attorney
RALPH A. JACOBS
Assistant United States Attorney

* Hon. Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

Federal Building
Newark, New Jersey 07101

J U D G M E N T O R D E R

Joseph Dottino appeals from a judgment of sentence following his conviction for willful evasion of and filing false returns of federal income tax. He contends that the government attorney improperly commented on his failure to (1) produce evidence which the defense urged would be exculpatory; and (2) that the government attorney made improper use of inconsistencies between his statement to an internal revenue agent and his defense at trial. We find no error.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed.

By the Court,

s/ John J. Gibbons
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

Dated: Mar. 22, 1979

Certified as a true copy and issued in lieu of a formal mandate on April 13, 1979.

Test: s M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit